No. 12,460

IN THE

United States Court of Appeals

For the Ninth Circuit

ROBERT NELSON LANTIS,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court, Territory of Hawaii.

BRIEF FOR APPELLANT.

SMITH, WILD, BEEBE & CADES,
J. EDWARD COLLINS,
Bishop Trust Building, Honolulu, T. H.,
Attorneys for Appellant.

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STATEMENT AS TO JURISDICTION.

This is an appeal from a judgment of conviction and from an order denying a motion for a new trial in the United States District Court for the District of Hawaii. The indictment is in two counts. The first count charges a conspiracy in violation of 18 U.S.C. § 80, the object of which conspiracy is to violate 18 U.S.C. § 80. The second count charges the commission of a crime in violation of 18 U.S.C. § 80 (R. 2-5). Both offenses charged occurred prior to September 1, 1948, the effective date of the present revision of 18 U.S.C.

The United States District Court for the District of Hawaii had jurisdiction of the cause by virtue of 18 U.S.C. § 3231. This court has jurisdiction of this appeal by virtue of 18 U.S.C. §§ 1291 and 1294.

STATEMENT OF THE CASE.

On March 23, 1949, the defendant, a non-veteran, was indicted by the United States Grand Jury for having conspired in October and November, 1946, with one Oliver Abreu, a veteran, for the purchase of a surplus vehicle from the Territorial Surplus Property Office, an office of a department or agency of the United States, for the defendant's use, under Abreu's veteran's priority. The defendant was also indicted for the substantive offense of causing a false statement to be filed in connection with the purchase. The trial was jury waived. Abreu, the other alleged conspirator, was not indicted and was the principal witness for the Government.

The defendant testified on his own behalf that he had loaned the purchase price to Abreu in order that Abreu could purchase the vehicle for his, Abreu's, use.

Only one transaction was involved. The purchase price of the jeep was Three-Hundred Twenty-Five Dollars ($325). The only evidence of its value was furnished by the defendant who was in the auto repairing and car rental business. The vehicle being in a wrecked

condition (R. 61), he fixed its value at One-Hundred Fifty Dollars ($150) (R. 83).

The defendant was convicted on both counts, the sentence being imprisonment for a year and a day on the conspiracy count, and a One-Thousand Dollar ($1,000) fine on the second count (R. 8, 9).

A motion for a new trial on the ground of newly discovered evidence (R. 10-17) was denied after hearing (R. 112-126). Appeal was taken from the judgment of conviction on the basis that it was unsupported by the evidence, and from the order denying the new trial (R. 18-22).

The principal point urged by the appellant is that the evidence interpreted most favorably to the Government does not, as a matter of law, establish a conspiracy warranting conviction under the first count.

A more detailed analysis on the evidence will be subsequently made under the various legal points hereinafter discussed.

SPECIFICATIONS OF ERRORS.

1. That the evidence is insufficient as a matter of law to sustain any count in the indictment;

2. That the Court erred in denying the motion for a new trial;

3. By reason of said errors and other manifest errors appearing in the record designated herein the judgment of conviction should be set aside.

Of these errors the first will be urged in this appeal with respect to the first, or conspiracy count only. The second error will not be urged on this appeal.

SUMMARY OF ARGUMENT.

To convict of a conspiracy involving only two conspirators, both must have the requisite knowledge, intent, and motive. Failure of one of the conspirators to meet the essential requirements necessarily requires the acquittal of the other alleged conspirator irrespective to that other's knowledge, intent, or motive.

To convict of a conspiracy, the object of which is to specifically violate 18 U.S.C. § 80, knowledge of both conspirators of the existence of that law is essential. The Government has failed to prove that either or both of the alleged conspirators knew of the law at the time of the alleged violation. This negatives the existence of a conspiracy for that purpose.

In order to have a violation of 18 U.S.C. § 80, it is necessary not only that a false statement be filed with the Government or a department or agency thereof, but it is also requisite that the person filing the statement knew that it was false. Merely filing a false statement does not constitute a violation of that section. The evidence does not show that Abreu knew the statement filed by him was false. No inference can be drawn from the evidence that such was the fact.

In order to have a conspiracy, the object of which is to perform acts which are in violation of 18 U.S.C. § 80, it is necessary that the conspirators conspire to file a false statement knowing that the statement to be filed is false. The failure of the Government to prove that Abreu knew that the statement to be filed and filed by him for the acquisition of the jeep was a false statement negatives the existence of a conspiracy for that purpose. No inference can be drawn from the evidence that Abreu knew at any time that the object of the agreement was the acquisition of a jeep by virtue of the filing by him of a false statement.

In order to have a conspiracy, it is necessary that the Government prove that the conspirators had a corrupt motive and had the intent to commit a crime. The Government has failed to prove that Abreu had such motive or intent. Consequently, the evidence is insufficient as a matter of law to sustain the first count of the indictment.

I.

THE EVIDENCE IS INSUFFICIENT AS A MATTER OF LAW TO SUSTAIN THE FIRST COUNT IN THE INDICTMENT.

The indictment under this count charges that the defendant and Oliver Abreu knowingly and wilfully conspired to violate 18 U.S.C. § 80 by making and presenting to the Territorial Surplus Property Office a false and fraudulent application, statement, and certificate that a designated jeep would be purchased by Abreu, a veteran, for his own and sole use in his

business, whereas, it was the intention of the conspirators to purchase the jeep for the use of the defendant, a non-veteran, who was not entitled to the benefit of the veterans' priority privilege. Certain overt acts are alleged including a meeting between the conspirators, a presentation of the application for the purchase of the jeep, and payment therefor. This count is laid under 18 U.S.C. § 88.

The pertinent provisions of § 80 of Title 18, read:

> "* * * whoever, * * * for the purpose and with the intent of cheating and swindling or defrauding the Government of the United States, or any department thereof, * * * shall knowingly and willfully * * * make or cause to be made any false or fraudulent statements or representations, or make or cause to be made or used any false * * * account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, shall be fined not more than $10,000 or imprisoned not more than ten years, or both."

The pertinent provisions of § 88 of Title 18 (Criminal Code, § 37) read:

> "If two or more persons conspire * * * to commit any offense against the United States, * * * and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both."

To have a conspiracy within the provisions of § 88 as well as at common law, there must be at least two

conspirators. One person cannot be a conspirator by himself. A showing, therefore, that one of the parties was not a conspirator will necessitate a holding that the other party be acquitted of that charge. Likewise, a failure by the Government to prove that both were conspirators is a failure to prove that either were conspirators.

Morrison v. California, 291 U.S. 82 (1933);
Gebradi v. United States, 287 U.S. 112 (1932);
Turinetti v. United States, 2 F. (2d) 15 (8th Cir. 1924);
Commonwealth v. Benesch, 290 Mass. 125, 194 N.E. 905 (1935).

As was stated in the *Morrison* case, 291 U.S. 82:

> "It is impossible in the nature of things for a man to conspire with himself. * * * In California as elsewhere conspiracy imports a corrupt agreement between not less than two with guilty knowledge on the part of each." (p. 92.)
>
> "* * * Doi was not a conspirator, however guilty his own state of mind, unless Morrison had shared in the guilty knowledge and design. * * * The joinder was something to be proved, for it was of the essence of the crime. * * * The conviction failing as to the one defendant must fail as to the other." (p. 93.)

A. Lack by Abreu of knowledge requisite for violation of 18 U.S.C. § 80.

That a specific intent is necessary for a criminal conspiracy is basic. The very essence of the crime is

the combination of two or more minds to further their specific criminal intent or purpose.

Marino v. United States, 91 F. (2d) 691 (9th Cir. 1937);

Fowler v. United States, 273 Fed. 15 (9th Cir. 1921);

Elkin v. People, 28 N.Y. 177 (1863);

Albert J. Harno, *Intent in Criminal Conspiracy,* 80 U. of Pa. L. Rev. 624.

In the *Fowler* case, supra, 273 Fed. 15 at 19, this court stated that the agreement requisite for a criminal conspiracy exists "if there be a concert of action, all of the parties working together understandingly, with a single design for the accomplishment of a common purpose". This language was subsequently cited with approval by this court in the *Marino* case, which also adopted the definition of conspiracy as "a partnership in criminal purposes. * * * The gist of the crime * * * is the * * * combination of minds". (p. 691.)

In the *Elkin* case, supra, 28 N.Y. 177 at 179, it is stated:

> "* * * The gravamen of the offense, that if two or more persons shall conspire falsely and maliciously, to procure another to be charged or arrested for any offense, they shall be deemed guilty of a misdemeanor, clearly imports that the false or malicious intent or state of mind applied to the act of making the charge or causing the arrest. This state of mind does not refer to the act of conspiring, but to the fruits of the conspiracy."

The principle has been tersely stated by Mr. Justice Jackson in his concurring opinion in the case of *Krulewitch v. United States,* 336 U.S. 440 (1948) at 448 in the following language:

> "The modern crime of conspiracy * * * is always 'predominantly mental in composition' because it consists primarily of the meeting of minds and an intent."

That it is necessary to allege in the indictment and to prove the evil intent necessary to constitute the act a crime, where the intent is an essential part of the crime, has long been an established principle of criminal law.

Chitty on Criminal Law, 3rd Am. Ed. (1836), § 233;

Bishop's New Criminal Procedure (1895), § 522;

Clark & Marshall on Crimes, 4th Ed. (1940), § 49.

As to the application of this principle in conspiracy cases, see *Pettibone v. United States,* 148 U.S. 197 (1892); *Commonwealth v. Hunt,* 4 Metc. (Mass.) 111.

The specific intent set forth in the first count of the indictment is contained in the allegation that the conspirators "* * * did knowingly, wilfully, unlawfully and feloniously conspire, combine, confederate and agree together and with each other to violate Section 80, Title 18, United States Code, * * *" by making and filing a false statement in connection with the purchase of a jeep (R. 2-4).

This specific intent of violating Section 80, Title 18 of the United States Code said to be the object of the conspiracy was not proved. There is no proof that either of the alleged conspirators knew of the existence of the law, the violation of which it is contended was the specific object of their conspiracy. Even if the Government could be aided by any presumption that the parties knew the law, such presumption would not stand in face of rebutting evidence. *Blumenthal v. United States,* 88 F. (2d) 522, 530 (8th Cir. 1937). The case in chief of the Government clearly establishes that Abreu did not realize that he was breaking any law, for he so testified (R. 46).

The intent necessary for the crime charged not having been proved, there was no conspiracy as charged.

Salas v. United States, 234 Fed. 842 (2nd Cir. 1916);

Buchanan v. United States, 233 Fed. 257 (8th Cir. 1916).

The defendant should, therefore, have been acquitted on the conspiracy count.

However, in the event it should be held that there is no fatal variance between the indictment charge that the conspirators intended to specifically violate Section 80 of Title 18 and the proof that they did not intend to violate that section but intended at most to do certain acts which might, under certain circumstances, be violative of that section, then consideration

must be given to the question as to whether persons can be held guilty as conspirators when they conspire to do acts which are violative of a statute, the conspirators being unaware of that fact.

As has been previously pointed out, a criminal intent is necessary for conspiracy. The nature of the crime of conspiracy is such that a fraudulent or criminal intent or a corrupt motive is essential. It is not the doing of any act that constitutes the crime, but rather it is the joinder together of criminal intentions that constitutes the crime.

Whether it is possible to have the necessary criminal intent or corrupt motive without a knowledge of the fact that the unlawful object of the conspiracy is actually unlawful is a question that has been considered some nine times by various courts in the United States. Unlike other fields of the law where everyone is presumed to know the law, it is distinctly questionable whether such presumption is of any validity in the instance where the object of the conspiracy is to do an unlawful act. Without knowledge that the act is unlawful, it is submitted there cannot be the necessary criminal intent or corrupt motive.

This problem was first raised in the United States in the case of *People v. Powell,* 63 N.Y. 88 (1875). The trial court instructed that all that was required to be proved was that the defendants agreed to do an act, which act was violative of a New York statute. The court further charged that ignorance of the law or an absence of intent to violate it was no defense.

On appeal the judgment was reversed, the court stating:

> "* * * The agreement must have been entered into with an evil purpose, as distinguished from a purpose simply to do the act prohibited in ignorance of the prohibition." (p. 92.)

Thus, the first case found to have raised the point in American jurisprudence takes the position that ignorance of the law nullifies the requisite intention or the corrupt motive that must inspire conspirators.

The same approach was used subsequently in New Jersey in the case of *Wood v. State,* 47 N.J.L. 461, 1 Atl. 509 (1885), where it was held that a conspiracy indictment was fatally defective in that it was not alleged that the defendants knew the act which was the object of the conspiracy was an unlawful act, and consequently there was an absence of a charge that there was a corrupt purpose in entering into the conspiracy.

The question was raised again in New York in the case of *People v. Flack,* 125 N.Y. 324, 26 N.E. 267 (1891). There the trial court charged that the defendants' ignorance of the meaning of the conspiracy statute could not be a shield to them if it was found that the acts which were violative of the statute were, in fact, committed. The Court of Appeals, however, held that such instructions were erroneous, stating:

> "* * * The actual criminal or wrongful purpose must accompany the agreement, and, if that is absent, the crime of conspiracy has not been committed." (26 N.E. 270.)

> "* * * The character of the acts done, the design with which they were done, and whether fraudulent or not, were questions for the jury." (26 N.E. 271.)

Subsequently the same problem was raised in the case of *Commonwealth v. Gormley,* 77 Pa. Sup. Ct. 298 (1921). In that case, the trial court rejected evidence tending to show the defendants' bona fide belief that their act was lawful. This was held to be error on appeal, the Appellate Court taking the position that a defendant charged with conspiracy may introduce evidence to show that he had no intention to violate the law, and consequently that there was no corrupt motive inspiring him to do the act.

This problem has been presented to three circuit courts with varying results. In *Chadwick v. United States,* 141 Fed. 225 (6th Cir. 1905), the doctrine of the previous cases was repudiated without mention of the cases themselves. The court states:

> "* * * Knowledge that the act which it was the object of the conspiracy to do would be in violation of the law is imputed and need not be proven. Neither do we understand that in courts of the United States the fact that the object of the conspiracy was to do an act which is only mala prohibita requires evidence of knowledge of the unlawfulness of the act purposed by the conspirators. The conspiracy itself is one created by statute and is made out by evidence that its object was to perpetrate some offense against the United States. * * * knowledge of the statute forbidding a

certification in excess of a deposit is imputed. An unlawful or wrongful intent may be implied from the intentional doing of an unlawful act." (p. 243.)

This case was subsequently cited with approval in *Hamburg-American Steam Packet Co. v. United States,* 250 Fed. 747 (2nd Cir. 1918). However, the Second Circuit in its decision referred to the *Flack* and *Powell* cases (pp. 758, 759) and distinguished the latter on the ground that the act of the defendant, which was the object of the conspiracy in the case before it, was not an innocent act but was dishonest and fraudulent. The approach of this court appears to be that where the act which is the object of the conspiracy is obviously unlawful, it is immaterial whether the defendant knows that the act is violative of the law. Certiorari was denied. 246 U.S. 622, 38 S. Ct. 333, 62 L. Ed. 927. For a more recent expression of the position of the Second Circuit, see *United States v. Mack,* 112 F. (2d) 290 (2nd Cir. 1940); *United States v. Ausmeier,* 152 F. (2d) 349 (2nd Cir. 1945).

In *Landen v. United States,* 299 Fed. 75 (6th Cir. 1924), the Sixth Circuit reversed a conviction of conspiracy on the ground that there was error in the ruling by the trial court that reasonable belief in the legality of the act constituted no defense. In the decision the court reaffirms the principle of the *Powell* case and limits the application of the *Chadwick* and *Hamburg-American* cases to situations where the act to be done is inherently wrongful.

In Massachusetts the problem was raised in the case of *Commonwealth v. Benesch,* 290 Mass. 125, 134, 135, 194 N.E. 905, 910 (1935), where the Supreme Judicial Court stated:

> "To constitute the criminal intent necessary to establish a conspiracy there must be both knowledge of the existence of the law and knowledge of its actual or intended violation."

The final case found on the subject, *Cruz v. United States,* 106 F. (2d) 828 (10th Cir. 1939), was decided by the Tenth Circuit. In that case it was held that it is not necessary to establish knowledge on the part of the defendant of the existence of the law defining the offenses even where it is *mala prohibita.* Where a corrupt motive is established, such knowledge is imputed. This case is a throw-back to the repudiated doctrine of the *Chadwick* case. This represents the law, if it is the law, only in the Tenth Circuit, and, it is submitted is not solidly grounded, the cases cited for its holding not standing for the principle claimed (Footnote p. 830).

No case has been found either in this Circuit or in the Supreme Court dealing specifically with this point.

It is therefore to be seen that with the exception of the *Chadwick,* the *Hamburg-American Company* and the *Cruz* cases, the decisions in the United States have consistently held that in order to have the requisite intent and corrupt motive, it is essential that the conspirators know that the act they are planning to commit is violative of the law. The absence of such knowl-

edge on their part negatives the existence of a conspiracy.

The *Hamburg-American* case goes along with this principle in instances where the act contemplated is not obviously unlawful. Where of its nature it is inherently violative of the law and obviously so, the belief of a conspirator that it is not unlawful would, according to the court, be completely unreasonable, and the Sixth Circuit similarly limits the application of the *Chadwick* case.

It may thus be concluded that one of two principles is applicable in conspiracy cases. Either ignorance that the object of the conspiracy is violative of law will negative the requisite criminal intent or corrupt motive in all cases, or it will do so only in cases where the object of the conspiracy is so obviously illegal that no reasonable person could suppose the act was lawful.

It makes no difference, however, which principle is applied in the instant case. An agreement to buy a jeep for the use of someone other than the purchaser is not *malum in se*. A purchase by a veteran of a surplus jeep from the Government for the use of other than a veteran is *mala prohibita* only. The act of purchasing the jeep is not so obviously illegal that no reasonable man could suppose the act was lawful.

If the defendants or either of them did not know the act contemplated was violative of the law, then there was no conspiracy.

An analysis of the record clearly shows that no evidence was adduced to prove that either of the alleged

conspirators knew of the law that their contemplated acts might violate. The record affirmatively shows that Abreu did not know that the contemplated acts were violative of the law (R. 46).

It is submitted that in this posture of the case, Abreu's testimony having been adduced on direct examination by the Government and not being impunged in any way by the prosecution, one of the essential elements of a conspiracy is lacking. As a consequence, irrespective as to the defendant's knowledge, belief, intention, or corrupt motive, there was no conspiracy and, therefore, the defendant should be acquitted on that count.

B. Lack of requisite knowledge by Abreu that the documents to be filed were false and fraudulent.

Section 80 of Title 18 of the United States Code, the violation of which it is alleged the conspirators conspired to accomplish, requires that the person violating the statute shall have the purpose and intent of cheating and swindling or defrauding the Government of the United States and shall file a false and fraudulent statement knowing that it is fraudulent or fictitious.

Under this action, the knowing falsity of the statement filed is the very essence of the crime.

United States v. Uram, 148 F. (2d) 187 (2nd Cir. 1945);

Bridgeman v. United States, 140 Fed. 577 (9th Cir. 1905);

Christensen v. United States, 90 F. (2d) 152 (7th Cir. 1937);

United States v. Buckley, 49 F. Supp. 993 (D.C.D.C. 1943);

United States v. Long, 14 F. Supp. 29 (D.C. Mass. 1936);

United States v. Reichert, 32 Fed. 142 (C.C.D. Calif. 1887);

United States v. Bittinger, 29 Fed. Cas. No. 14,599 at 1150 (D.C. Mo. 1875).

The Second Circuit in the *Uram* case stated this principle in the following language:

> "* * * It is the knowing falsity of the statement which is the material part of the statutory crime, not the vehicle of its perpetration." (148 F. (2d) 187, 190.)

The construction of this section to the effect that the statute means what it says, and the requirement that the person filing the false statement must know that it is false, is not peculiar to this statute. Other Federal statutes containing the same requirements as to knowledge have been similarly interpreted. *Cliquot v. United States* (Cliquot's Champagne), 3 Wall. 114, 18 L. Ed. 116 (1866).

A statutory crime strikingly similar in language to one had under Section 80 was construed by this court in the case of *C.I.T. Corporation v. United States,* 150 F. (2d) 85 at 93:

> "The crime charged against Thomas, * * * was conspiracy to 'cause to be made' an instrument 'knowing the same to be false' and 'for the purpose of influencing * * * the action of said Administration.' Knowledge of falsity and a pur-

pose, that is, intent to use the falsehood for such influence, is the essence of the crime. It is not sufficient to prove Thomas guilty to show that he signed a document with an untruthful statement which might tend to influence the Administration. The burden on the government is to prove his knowledge of its falsity and his criminal intent so to influence the Administrator's acceptance of the borrower's note. This proof may be by circumstantial evidence, but such facts must be proved."

The Second Circuit has made a similar construction in a case involving a conspiracy with intent to violate the Alien Registration Law. In *United States v. Ausmeier,* 152 F. (2d) 349 at 356, the following language is found:

"But the making of such false statements was not enough to justify a verdict of guilt. Pursuant to 18 U.S.C.A. § 88, each of the defendants was charged with and convicted of conspiring to defraud the United States by the filing of statements in violation of the Alien Registration Act, 8 U.S.C.A. § 452 et seq. Section 457 (c) of that Act imposes a penalty on an alien who 'files an application for registration containing *statements known by him to be false* * * *.' As the substantive crime thus involved both (a) falsity and (b) knowledge of the falsity, the defendants were obviously entitled to have the judge charge, in the most unmistakable language, that no defendant here could be found guilty unless he was a party to an agreement, plan, or combination, to file an application containing statements known to him to be false. The existence of a common undertak-

ing, in which a defendant joined, merely to file statements which were false, but not known to him to be false, could not support his conviction."

The necessity of knowledge as an essential element of the crime of violating the National Housing Act and the Alien Registration Act is similar to that required for violation of Section 80. It is submitted that the principles enunciated in the *C.I.T. Corporation* case and in the *Ausmeier* case are determinative of the problem involved in this case, and that the former case is the controlling precedent to be followed by this court in the instant situation.

Further, since the indictment charges the conspiracy to have continued only during the period November 12 to November 30, 1946 (R. 2), this knowledge must be proved to have been had during this period. How has the Government met this burden of proof?

There is no proof that Abreu, an automobile mechanic, read any of the statements filed with the Territorial Surplus Property Office. There is no evidence that any of those statements were read to him or their contents explained to him. There is evidence that the first one (Exh. 1) was filled out by him on September 20, 1946, three weeks prior to the date on which it was charged that the conspiracy commenced. This form was filled out by Abreu with the defendant whom he regarded as his employer (R. 60) showing him how to fill it out because Abreu had had no experience with

such forms (R. 38). The purchase order (Exh. 2), the first statement filed by him during the alleged conspiracy period, was signed by him at the defendant's office at the defendant's request, the form having been furnished to Abreu by the defendant. When signed by Abreu, it was blank (R. 40, 41, 103, 106), and after having been signed, was apparently taken by the defendant and not thereafter seen by Abreu. There is absolutely no evidence that Abreu read it, that it was read to him, or its contents explained to him. Rather, his testimony shows that he followed the defendant's instructions, e.g., "Every time he tells me to go down, I'd go down with him" (R. 58); "What he told me was, sign this, and after that I went down here" (R. 59).

The third document signed by him (Exh. 3) had apparently been prepared for his signature, and he was not required to fill in any blanks but merely to affix his name. Again, there is no evidence that he read the document, that it was read to him, or explained to him.

Consistent, however, with the lack of proof of his having read or understood the document signed by him and consistent with the defendant's position that Abreu did not, in fact, realize that he was signing any false or fraudulent papers is his testimony on direct evidence that he was not concerned about the possible illegality of the transaction until "some time after we got the jeep" (R. 46). It is submitted that the only reasonable interpretation of this statement is that he did not sign a false and fraudulent statement knowing

and understanding it to be such. It is submitted that this is hardly the statement of a man who has with full knowledge and understanding signed an instrument he knows contains false and fraudulent misstatements.

To paraphrase the language of this court in the *C.I.T. Corporation* case:

> It isn't sufficient to show that Abreu signed a document with an untruthful statement. The burden on the Government is to prove his knowledge of its falsity and his criminal intent so to cheat and swindle or defraud the Government. This proof may be circumstantial evidence but such facts must be proved.

It is submitted that the facts do not either directly or circumstantially prove the requisite knowledge required by Title 18, United States Code, Section 80. If there is not the requisite knowledge to violate that section, there is not the requisite knowledge to be a conspirator to violate that section or to be a conspirator to do acts which are violative of that section.

CONCLUSION.

It is, therefore, respectfully submitted that:

1. The evidence presented to the trial court was insufficient as a matter of law to sustain the first count of the indictment charging that the defendant and Abreu had knowingly and wilfully conspired to violate 18 U.S.C. § 80 in that the evidence failed to establish

that both conspirators knew of the existence of this statute.

2. The evidence presented to the trial court was insufficient as a matter of law to sustain the first count of the indictment charging that the defendant and Abreu had knowingly and wilfully conspired to present to the Territorial Surplus Property Office a false and fraudulent application in that there was a failure of proof that both of the alleged conspirators knew that any statement filed was, in fact, false or fraudulent.

3. The evidence presented to the trial court was insufficient as a matter of law to sustain the first count of the indictment charging that the defendant and Abreu had knowingly and wilfully conspired to violate 18 U.S.C. § 80, the evidence failing to establish that both of the alleged conspirators knew that any object of the alleged conspiracy was violative of Federal law.

Wherefore, the appellant prays that the conviction of the lower court for violation of the first count of the indictment be reversed and that the appellant be acquitted thereof.

Dated, Honolulu, T. H., this 26th day of April, 1950.

SMITH, WILD, BEEBE & CADES,
By J. EDWARD COLLINS,
Attorneys for Appellant.